A

Kurniaan Maju Sdn Bhd v HSA Setiamurni Sdn Bhd

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24C-79–07 OF 2019
WONG KIAN KHEONG J
5 DECEMBER 2019

C *Civil Procedure — Originating summons — Hybrid or composite originating summons — Plaintiff applied for stay and Fortuna injunction in originating summons — Whether originating summons could lump together stay application and Fortuna injunction application — Whether stay application should be allowed — Whether court could grant Fortuna injunction if stay application was* D *dismissed — Whether court should exercise its discretion to grant Fortuna injunction — Specific Relief Act 1950 ss 50 & 51(2)*

Companies and Corporations — Winding up — Petition — Whether E *defendant was entitled to present winding up petition against plaintiff based on adjudication decision — Companies Act 2016 ss 464(1)(b) & 465(1)(e) — Construction Industry Payment and Adjudication Act 2012 ss 28 & 31*

F By a letter of award ('the construction contract'), the plaintiff had appointed the defendant as a subcontractor to construct an integrated building block in Bangi, Selangor ('the project'). The defendant initiated adjudication proceedings against the plaintiff and claimed for payment in respect of work done for the project under the construction contract. The adjudicator made an adjudication decision ('the AD') in favour of the defendant where the plaintiff G shall pay to the defendant a sum of RM281,136.70 ('the adjudicated sum'). Based on the AD, the defendant issued a notice under s 466(1)(a) of the Companies Act 2016 ('the CA') to the plaintiff ('the statutory demand') which demanded the plaintiff to pay to the defendant a sum of RM328,433.04 ('the demanded sum') which consisted of, among others, the adjudicated sum, costs H of adjudication proceedings and interest on the adjudicated sum. Hence, this originating summons ('the OS') by the plaintiff for: (a) an order under s 16(1)(b) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to stay the adjudication decision pending the disposal of the arbitration ('the stay application'); and (b) a Fortuna injunction to restrain the I defendant from presenting a petition to wind up the plaintiff based on the AD ('the Fortuna injunction application'). The issues for consideration were: (i) whether the OS could lump together the stay application and the Fortuna injunction application; (ii) whether the defendant was entitled to present winding up petition against the plaintiff based on the AD; (iii) whether the stay

application should be allowed; (iv) whether the court could grant a Fortuna injunction if stay application was dismissed; (v) whether the court should exercise its discretion to grant a Fortuna injunction.

Held, dismissing the OS with costs:

(1) A hybrid or composite OS could be filed by the plaintiff. There was nothing in the CIPAA, CA, Rules of Court 2012 or any other written law which prohibited a hybrid or composite OS. Therefore, the OS was not defective for lumping together the stay application and Fortuna injunction application (see paras 8 & 26).

(2) The defendant was entitled to wind up the plaintiff based on the AD. The defendant was a 'creditor' of the plaintiff within the meaning of s 464(1)(b) of the CA and was therefore entitled to present a winding up petition against the plaintiff under s 465(1)(e) of the CA (see para 11).

(3) The plaintiff had not satisfied the court that the adjudicator had made a clear error in making the AD. It was in the interest of justice that the AD was not stayed pending the disposal of the arbitration because: (a) the defendant would suffer irreparable prejudice which outweighed any prejudice which may be caused to the plaintiff; (b) there was no evidence that the defendant was commercially insolvent; (c) the defendant had not been served with any statutory demand by any of the defendant's creditors; (d) the defendant's financial statement did not show that the defendant was commercially and/or financially insolvent; and (e) there was no evidence to show that if the plaintiff was successful in the arbitration, the defendant was not able to pay the amount of plaintiff's arbitration claim. Hence, there was no real risk that the arbitration will be rendered academic (see para 16).

(4) The court had a discretionary power to grant a Fortuna injunction under ss 50 and 51(2) of the Specific Relief Act 1950 notwithstanding the fact that the stay application had been dismissed. However, the court was unable to exercise its discretion because by reason of the AD the defendant was entitled to present a winding up petition against the plaintiff under ss 464(1)(b) and 465(1)(e) of the CA; and the defendant's exercise of its statutory rights under ss 464(1)(b) and 465(1)(e) of the CA could not amount to an abuse of court process. Accordingly, there was no basis for this court to issue a perpetual Fortuna injunction in the plaintiff's favour (see paras 20 & 25).

[Bahasa Malaysia summary

Melalui surat award ('kontrak pembinaan'), plaintif telah melantik defendan sebagai subkontraktor untuk membina blok bangunan bersepadu di Bangi, Selangor ('projek'). Defendan memulakan prosiding adjudikasi terhadap plaintif dan menuntut pembayaran berkenaan dengan kerja yang dilakukan

untuk projek di bawah kontrak pembinaan. Adjudikator membuat keputusan adjudikasi ('AD') memihak kepada defendan di mana plaintif akan membayar kepada defendan sejumlah RM281,136.70 ('jumlah penghakiman'). Berdasarkan AD, defendan mengeluarkan notis di bawah s 466(1)(a) Akta Syarikat 2016 ('AS') kepada plaintif ('tuntutan statutori') yang menuntut plaintif membayar sejumlah wang kepada defendan sebanyak RM328,433.04 ('jumlah yang dituntut') yang merangkumi, antara lain, jumlah penghakiman, kos prosiding adjudikasi dan faedah atas jumlah penghakiman. Oleh itu, saman pemula ('SP') ini oleh plaintif untuk: (a) satu perintah di bawah s 16(1)(b) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') untuk menangguhkan keputusan adjudikasi sementara menunggu pelupusan timbang tara ('permohonan penangguhan'); dan (b) satu injunksi Fortuna untuk menghalang defendan daripada mengemukakan petisyen untuk menggulung plaintif berdasarkan AD ('permohonan injunksi Fortuna'). Isu-isu untuk pertimbangan adalah: (i) sama ada SP boleh menyatukan permohonan penangguhan dan permohonan injunksi Fortuna; (ii) sama ada defendan berhak mengemukakan petisyen penggulungan terhadap plaintif berdasarkan AD; (iii) sama ada permohonan penangguhan patut dibenarkan; (iv) sama ada mahkamah boleh memberikan injunksi Fortuna jika permohonan penangguhan ditolak; (v) sama ada mahkamah harus menggunakan budi bicaranya untuk memberikan injunksi Fortuna.

Diputuskan, menolak SP dengan kos:

(1) SP hibrid atau komposit boleh difailkan oleh plaintif. Tiada apa-apa dalam Akta, AS, Kaedah-Kaedah Mahkamah 2012 atau undang-undang bertulis lain yang melarang SP hibrid atau komposit. Oleh itu, SP tidak cacat kerana menyatukan permohonan penangguhan dan permohonan injunksi Fortuna (lihat perenggan 8 & 26).

(2) Defendan berhak menggulung plaintif berdasarkan AD. Defendan adalah 'pemiutang' plaintif dalam maksud s 464(1)(b) AS dan oleh itu berhak mengemukakan petisyen penggulungan terhadap plaintif di bawah s 465(1)(e) AS (lihat perenggan 11

(3) Plaintif tidak memuskan mahkamah bahawa adjudikator telah melakukan kesalahan yang jelas dalam membuat AD. Demi kepentingan keadilan, AD tidak ditangguhkan sementara menunggu pelupusan timbang tara kerana: (a) defendan akan mengalami prejudis secara teruk yang melebihi mana-mana prejudis yang mungkin ditimbulkan kepada plaintif; (b) tidak ada keterangan bahawa defendan tidak solven; (c) defendan tidak diserahkan dengan apa-apa tuntutan statutori oleh mana-mana pemiutang defendan; (d) penyata kewangan defendan tidak

menunjukkan bahawa defendan tidak solven secara komersial dan/atau dari segi kewangan; dan (e) tidak ada keterangan yang menunjukkan bahawa sekiranya plaintif berjaya dalam timbang tara, defendan tidak dapat membayar jumlah tuntutan timbang tara plaintif. Oleh itu, tidak ada risiko nyata bahawa timbang tara akan menjadi akademik (lihat perenggan 16).

(4) Mahkamah mempunyai kuasa budi bicara untuk memberikan injunksi Fortuna berdasarkan ss 50 dan 51(2) Akta Relief Spesifik 1950 walaupun hakikat bahawa permohonan penangguhan telah ditolak. Namun, mahkamah tidak dapat menggunakan budi bicaranya kerana disebabkan AD, defendan berhak mengemukakan petisyen penggulungan terhadap plaintif berdasarkan s 464(1)(b) dan 465(1)(e) AS; dan pelaksanaan hak undang-undang defendan di bawah s 464(1)(b) dan 465(1)(e) AS tidak boleh dianggap sebagai penyalahgunaan proses mahkamah. Oleh itu, tidak ada dasar bagi mahkamah ini untuk mengeluarkan injunksi Fortuna berterusan bagi pihak plaintif (lihat perenggan 20 & 25).]

Cases referred to

Celcom (M) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors and another [2018] 10 MLJ 397; [2017] 4 AMR 418, HC (refd)
Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244, CA (folld)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (folld)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2019] MLJU 742; [2019] 5 AMR 516, FC (refd)
RHB Bank Bhd v Gunasingam a/l Ramasingam [2002] 7 MLJ 492; [2002] 5 CLJ 544, HC (refd)
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355; [2007] 2 CLJ 305, CA (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (folld)

Legislation referred to

Companies Act 2016 464(1)(b), 465(1)(e)
Contruction Industry Payment and Adjudication Act 2012 ss 13(a), 15(a), (b), (c), (d), 16, 16(1)(a), (1)(b), 28, 28(1), (2), (3), 31
Rules of Court 2020 O 1A, O 2 r 1(1), (2), (3), O 34 r 1(1)(b), O 28 r 3B, 3B(1), (1)(a), (3)
Specific Relief Act 1950 ss 50, 51(2)

Vishal a/l V Kumar (James Monteiro) for the plaintiff.
Abdul Rashid bin Ismail (Ashuvynni a/p Silver Raju with him) (Rashid Zulkifli) for the defendant.

Wong Kian Kheong J:

ISSUES

[1] This originating summons ('OS') raises the following three novel questions:

(a) whether the plaintiff company ('the plaintiff') can file a 'hybrid' or 'composite' OS which applies for:

(i) an order under s 16(1)(b) of the Contruction Industry Payment and Adjudication Act 2012 ('the CIPAA') to stay an adjudication decision dated 19 April 2019 ('AD') made by Mr Khoo Chin Chio (adjudicator) in favour of the defendant company ('defendant') against the plaintiff pending the disposal of an arbitration regarding the dispute between the plaintiff and defendant ('arbitration'); and

(ii) a 'Fortuna Injunction' to restrain the defendant from presenting a petition to wind up the plaintiff based on the AD. In this respect, is the defendant a 'creditor' of the plaintiff under s 464(1)(b) of the Companies Act 2016 ('the CA') who is entitled to present a winding up petition against the plaintiff based on the AD?

(b) whether the court should exercise its discretion pursuant to s 16(1)(b) of the CIPAA to stay the AD pending the disposal of the arbitration ('stay application'); and

(c) if the court dismisses the stay application, does the court have the discretionary power to grant a Fortuna injunction to restrain the defendant from presenting a petition to wind up the plaintiff based on the AD ('Fortuna injunction application')? If 'yes', whether the court should exercise its discretion to allow the Fortuna injunction application in this case.

BACKGROUND

[2] By a letter of award dated 9 May 2016 ('construction contract'), the plaintiff had appointed the defendant as a subcontractor to construct an integrated building block in Bangi, Selangor ('project').

[3] The defendant initiated adjudication proceedings against the plaintiff and claimed for payment in respect of work done for the project under the construction contract.

[4] The adjudicator made the AD as follows, among others:

(a) the plaintiff shall pay to the defendant a sum of RM281,136.70 ('adjudicated sum') on or before 6 May 2019;

(b) the plaintiff shall pay to the defendant interest at the rate of 5%pa on the adjudicated sum from 6 May 2019 until full payment of the adjudicated sum; and

(c) the plaintiff shall pay to the defendant costs of the adjudication proceedings.

[5] Based on the AD, the defendant's solicitors issued a notice dated 8 July 2019 under s 466(1)(a) of the CA to the plaintiff ('statutory demand') which demanded the plaintiff to pay to the defendant a sum of RM328,433.04 (as at 8 July 2019) ('demanded sum') within 21 days from the plaintiff's receipt of the statutory demand. The demanded sum consisted of, among others, the adjudicated sum, costs of adjudication proceedings and interest on the adjudicated sum.

WHETHER THIS OS CAN LUMP TOGETHER STAY APPLICATION AND FORTUNA INJUNCTION APPLICATION

[6] The defendant's learned counsel, Encik Abdul Rashid bin Ismail, has contended that the plaintiff cannot file a 'hybrid' OS which applies for a stay of the AD pending the disposal of the arbitration and a Fortuna injunction. According to Encik Rashid, a stay of the AD pending the disposal of the arbitration is provided by s 16(1)(b) of the CIPAA and is different from the court's power to grant a Fortuna injunction. As such, Encik Rashid has opined that the plaintiff should have filed two OS's, one OS for the stay application and another OS regarding the Fortuna injunction application.

[7] The plaintiff's learned counsel, Mr Vishal a/l V Kumar, had the candour to admit that he could not find any Malaysian case which could support a hybrid or composite OS in this case.

[8] I am of the view that a hybrid or composite OS can be filed by the plaintiff. My reasons are as follows:

(a) there is nothing in the CIPAA, CA, Rules of Court 2012 ('the RC') or any other written law which prohibits a hybrid or composite OS;

(b) if a hybrid or composite OS is filed, the court has to decide separately (with reasons) in the OS regarding the stay application and Fortuna injunction application. This is because, as explained below, the test for the court to determine a stay application differs from the test which will be applied by the court in deciding a Fortuna injunction application;

(c) the three-fold objective of RC is to ensure a just, expeditious and

economical disposal of cases — please see O 34 r 1(1)(b) of the RC and *Celcom (M) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors and another* [2018] 10 MLJ 397; [2017] 4 AMR 418, at paras [19] and [20]. If I have required two OS's to be filed for a stay application and Fortuna injunction application ('two OS's'):

(i) this will unnecessarily burden all parties in respect of costs, time and effort to file and proceed with two OS's (instead of one hybrid or composite OS); and

(ii) precious judicial time may not have been utilised optimally because one court can decide both stay application and Fortuna injunction application in one hybrid or composite OS;

(d) by reason of O 1A and O 2 r 1(2) of the RC, all the RC 'shall' be applied by the court with regard to the 'overriding interest of justice' and not only to the technical non-compliance with RC. I reproduce below O 1A and O 2 r 1(2) RC:

Regard shall be to justice

O 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules*.

O 2 r 1(2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective*. (Emphasis added.)

The filing of two OS's does not serve the 'overriding interest of justice' as required by O 1A and O 2 r 1(2) RC; and

(e) O 2 r 1(1) and (3) of the RC state as follows:

O 2 r 1 Non-compliance with Rules

(1) *Where, in beginning* or purporting to begin *any proceedings* or at any stage in the course of or in connection with any proceedings, *there has, by reason of any thing done or left undone*, *been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings*, or any document, judgment or order therein.

...

(3) *The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity*. (Emphasis added.)

Even if it is assumed that this OS is defective for lumping together the stay application and Fortuna injunction application ('non-compliance'):

(f) based on O 2 r 1(1) of the RC, the court 'shall' treat the non-compliance 'as an irregularity' which 'shall not nullify the proceedings' and 'any step taken in the proceedings'; and

(g) I exercise my discretion under O 2 r 1(3) of the RC to cure the irregularity (caused by the non-compliance) because there is no prejudice to the defendant. The defendant has not suffered any prejudice due to the non-compliance as the defendant had filed two lengthy affidavits and a detailed written submission to oppose this OS.

[9] In any event, the defendant has waived its right to object to the non-compliance by not applying to court pursuant to O 28 r 3B(1)(a) and (3) of the RC for an order to set aside the OS premised on the non-compliance. I reproduce below the relevant part of O 28 r 3B(1)(a) and (3) of the RC:

O 28 r 3B *Dispute as to jurisdiction*

(1) *A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity in the originating summons* or service thereof or in any order giving leave to serve the originating summons out of the jurisdiction or extending the validity of the originating summons for the purpose of service or on any other ground *shall, within twenty-one days after the service of the originating summons and supporting affidavit or affidavits on him, apply to the Court for —*

(a) *an order setting aside the originating summons* or service of the originating summons *on him*;

...

(3) *An application under paragraph (1)* or (2) *shall be made by a notice of application supported by an affidavit verifying the facts on which the application is based and a copy of the affidavit shall be served with the notice of application*. (Emphasis added.)

O 28 r 3B of the RC is not found in the Rules of the High Court 1980. It is to be noted that the Rules Committee has employed the mandatory term 'shall' in O 28 r 3B(1) and (3) of the RC.

IS THE DEFENDANT ENTITLED TO WIND UP THE PLAINTIFF BASED ON AD?

[10] Sections 28 and 31 of the CIPAA as well as ss 464(1)(b) and 465(1)(e) of the CA provide as follows:

CIPAA:

28 Enforcement of adjudication decision as judgment

(1) *A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court*.

(2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

(3) *The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.*

31 Concurrent exercise of remedies

(1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.

(2) *The remedies provided by this Act are without prejudice to other rights and remedies available in* the construction contract or *any written law*, including any penalty provided under any written law.

CA:

464 Petition of winding up

(1) *A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the petition of any one or more of the following*:

...

(b) *any creditor*, including a contingent or prospective creditor, *of the company*; ...

465 Circumstances in which company may be wound up by Court

(1) *The Court may order the winding up if —*

(e) *the company is unable to pay its debts*; (Emphasis added.)

[11] I am of the view that the defendant is entitled to wind up the plaintiff based on the AD. This view is premised on the following reasons:

(a) in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244, at [16], [17] and [20]–[22], Abang Iskandar JCA (as he then was) delivered the following judgment of the Court of Appeal:

> [16] Now, *in our view, the language employed under s 28 (CIPAA), does not convey such an interpretation, in the sense that the decision of the adjudicator must be registered with the High Court before a statutory notice under ss 465(1)(e) and (h) [(CA) could be issued. Rather, it was our view that for the purpose of issuing a notice to wind-up a company pursuant to s 465(1)(e) and (h)*

(CA), it is not a mandatory requirement that there must be a judgment entered in favour of the respondent petitioner for the amount that was being claimed and pursued against the appellant debtor for payment of the same …

[17] *Again, prima facie, a creditor who is not paid, has a right to file a petition to wind up the debtor company. That appears to be the law* …

…

[20] *Now, compared to the situation obtaining in the instant appeal before us, it was worthy of note that the debt which was the central factum of the petition had been subjected to a mutually agreed specialised litigation between the parties, albeit by way of an adjudication proceeding which had resulted in a decision by the adjudicator dated 31 December 2016. That adjudication decision in favour of the respondent petitioner had thereby evinced the fact that an amount as stated in the said adjudication decision was due and owing to the respondent from the appellant. There was no application by the appellant to set aside the said adjudication decision. In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the appellant … As such, we were inclined to agree with the proposition that, for the purpose of filing a notice to wind up under s 465 [CA], a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under s 28 (CIPAA)* …

[21] *Also, we were of the view that s 31 (CIPAA) can be invoked by a successful party. There is nothing in the language employed in both ss 28 and 31 (CIPAA) which would liberally suggest that s 31 is subject to s 28 therein*. One thing is conspicuous. There is no specific reference made by either of the sections to each other. *In fact s 31(2) expressly provides that 'remedies provided by the CIPAA are without prejudice to other remedies available in the construction contract or any written law …'. So, it is in addition to s 28, not in derogation thereto*.

[22] *As such, we were of the view that the winding up petition was not premature, contrary to what was contended by learned counsel for the appellant before us*. (Emphasis added.)

In this case, the plaintiff has not applied to court to set aside the AD pursuant to ss 13(a) and 15(a)–(d) of the CIPAA. Accordingly, on the authority of *Likas Bay Precinct*, the defendant (in whose favour the AD is made) is a 'creditor' of the plaintiff within the meaning of s 464(1)(b) of the CA and is therefore entitled to present a winding up petition against the plaintiff under s 465(1)(e) of the CA; and

(b) s 28(1), (2) and (3) of the CIPAA concern the enforcement of an AD by way of 'execution' of the AD as if the AD is a judgment or order of the High Court. This is clear from s 28(3) of the CIPAA which provides that an order under s 28(2) of the CIPAA to enforce an AD 'may be executed in accordance with the rules on execution of the orders or judgment of

the High Court'.

The statutory right of a creditor of a company to wind up the company under ss 464(1)(b) and 465(1)(e) of the CA is not equivalent to an 'execution' of a court order and judgment. I rely on the following judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 at p 198; [2001] 3 CLJ 248 at pp 259–260 which concerns the previous Companies Act 1965 ('the CA 1965'):

> Mr Abraham sought to feebly argue that the respondent's petition comes within s 224 [CA 1965]. That section strikes down any attachment, sequestration, distress or execution against the assets of a company after the commencement of a winding up. And s 219(2) deems winding up to have commenced at the time of presentation of the petition for the winding up. Counsel seeks to rely on the judgment of Lord Denning MR in *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 where he said:
>
> > *'Execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment.*
>
> *But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 (CA 1965).* (Emphasis added.)

STAY APPLICATION

[12] Section 16 of the CIPAA provides as follows:

> 16 *Stay of adjudication decision*
>
> (1) *A party may apply to the High Court for a stay of an adjudication decision in the following circumstances*:
>
> (a) an application to set aside the adjudication decision under section 15 has been made; or
>
> (b) *the subject matter of the adjudication decision is pending final determination by arbitration* or the court.
>
> (2) *The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit*. (Emphasis added.)

[13] In *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22, at [76], [78], [79], [81], [82] and [84], Zulkefli PCA delivered the following judgment of the Federal Court regarding s 16 of the CIPAA:

[76] *The High Court in the present case held that an application under s 16 of the CIPAA can only be allowed in exceptional circumstances*. These exceptional circumstances were then described as necessarily relating 'to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes'.

...

[78] *The Court of Appeal in the present case adopted a similar approach. It said that unless there was 'overwhelming evidence' that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted*.

[79] *We are of the view that such a stringent test is not justified under the CIPAA because s 16 (CIPAA) itself contains no such limiting requirement or intent. Section 16 of the CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.*

...

[81] *From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. The CIPAA contains no such restriction.*

[82] *We are in agreement with the contention of the appellant that a more liberal reading of s 16 [CIPAA] would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However to restrict the application of s 16 (CIPAA) in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility*.

...

[84] *The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect we are of the view that the correct approach for the High Court under s 16 [CIPAA] would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor.* (Emphasis added.)

[14] I am of the view that an applicant for a stay of an AD under s 16(1)(a) or (b) of the CIPAA has the burden to persuade the court to exercise its discretion in favour of the application.

[15] Mr Vishal has contended that the stay application should be allowed on

any one or more of the following grounds:

(a) the employer of the project ('employer') has imposed liquidated and ascertained damages ('LAD') on the plaintiff to the tune of RM2,585 a day from 25 January 2019 and the amount of LAD continues to accumulate. The amount of LAD payable by the plaintiff to the employer exceeds the sum awarded to the defendant by the AD;

(b) there is a 'irresistible conclusion' that if there is no stay of the AD, the plaintiff is not able to recover the demanded sum in the event that the plaintiff is successful at the arbitration. The plaintiff relies on the following evidence:

(i) the defendant's financial information lodged with 'Suruhanjaya Syarikat Malaysia' for the financial year ending 30 June 2018 ('defendant's financial statement'), shows that the defendant's 'Profit after tax' is only RM235,329 (which is less than the demanded sum); and

(ii) the plaintiff has claimed a sum of RM1,456,882.61 from the defendant in the arbitration ('amount of plaintiff's arbitration claim'). The defendant's financial statement shows that the defendant's 'Retained Earning' only amounts to RM820,050 which is far less than the amount of plaintiff's arbitration claim; and

(c) if the AD is not stayed, the plaintiff will suffer prejudice which 'far outweighs' any prejudice which may be suffered by the defendant.

[16] Applying *View Esteem*, I exercise my discretion under s 16(1)(b) of the CIPAA not to allow a stay of the AD pending the disposal of the arbitration. This exercise of discretion is based on the following reasons:

(a) the plaintiff has not satisfied this court that the adjudicator has made a clear error in making the AD; and

(b) it is in the interest of justice that the AD is not stayed pending the disposal of the arbitration because:

(i) if the court stays the AD pending the disposal of the arbitration, the defendant will be deprived of cash flow which is the life-blood of the construction industry — please see the Federal Court's judgment delivered by Mohd Zawawi Salleh FCJ in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742; [2019] 5 AMR 516 at para [51]. If the AD is stayed pending the disposal of the arbitration, the defendant will suffer irreparable prejudice (lack of cash flow) which outweighs any prejudice which may be caused to the plaintiff by reason of the plaintiff's payment of the demanded sum;

(ii) there is no proof that the defendant is unable to pay its debts when such debts fall due for payment. In other words, there is no evidence that the defendant is commercially insolvent;

(iii) the defendant has not been served with any statutory demand under s 466(1)(a) of the CA by any of the defendant's creditors. Furthermore, no winding up petition has been presented against the defendant;

(iv) the defendant's financial statement does not show that the defendant is commercially and/or financially insolvent; and

(v) there is no evidence to show that if the plaintiff is successful in the arbitration, the defendant is not able to pay the amount of plaintiff's arbitration claim. Hence, there is no real risk that the arbitration will be rendered academic.

[17] In any event, the plaintiff has not discharged the onus to satisfy this court that the stay application should be allowed in the interest of justice.

[18] I have not overlooked the following two matters ('two matters'):

(a) the fact that the plaintiff is liable for LAD to the employer; and

(b) the amount of LAD (payable by the plaintiff to the employer) exceeds the demanded sum (based on the AD).

I am of the view that the two matters can only support the stay application if there is evidence to show that the plaintiff will be commercially and/or financially insolvent due to high amount of LAD to be paid by the plaintiff to the employer ('evide'nce of plaintiff's insolvency'). As there is no Evidence of plaintiff's Insolvency, the two matters are not sufficient to persade me to exercise the discretion under s 16(1)(b) of the CIPAA to allow the stay application.

CAN COURT GRANT FORTUNA INJUNCTION IF STAY APPLICATION IS DISMISSED?

[19] As explained in the above paras 16 and 17, the stay application is dismissed. The question that now arises is whether the court has the discretionary power to grant a Fortuna injunction in spite of the dismissal of the stay application.

[20] I am of the view that the court has a discretionary power to grant a Fortuna injunction notwithstanding the fact that the stay application has been dismissed. This is because the purpose of a Fortuna injunction is distinct from

the court's power to stay an AD under s 16(1)(a) and (b) of the CIPAA.

In the Court of Appeal case of *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355; [2007] 2 CLJ 305, at [7], Gopal Sri Ram JCA (as he then was) has explained the basis for the court to grant a Fortuna injunction. According to *Tan Kok Tong*, a Fortuna injunction is granted to a plaintiff company to restrain a defendant from presenting a winding up petition against the plaintiff company so as to prevent an abuse of court process by the defendant's filing of the winding up petition against the plaintiff company.

WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT A FORTUNA INJUNCTION IN THIS CASE

[21] In *Tan Kok Tong*, the Court of Appeal has decided that the court has an inherent jurisdiction to order a Fortuna injunction so as to prevent an abuse of court process.

[22] Sections 50 and 51(2) of the Specific Relief Act 1950 ('the SRA') provide as follows:

> 50 *Preventive relief how granted*
>
> *Preventive relief is granted at the discretion of the court by injunction,* temporary or *perpetual*.
>
> 51 Temporary and *perpetual injunctions*
>
> ...
>
> (2) *A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff*. (Emphasis added.)

[23] In the High Court case of *RHB Bank Bhd v Gunasingam a/l Ramasingam* [2002] 7 MLJ 492 at p 499; [2002] 5 CLJ 544 at p 550, Kang Hwee Ghee J (as he then was) has decided that the court has the power under s 50 SRA to grant a Fortuna injunction.

[24] I am of the respectful view that the court has a discretionary power under ss 50 and 51(2) of the SRA to grant a perpetual Fortuna injunction to restrain the filing of a winding up petition which constitutes an abuse of court process.

[25] In this case, the court is unable to exercise its discretion under ss 50 and 51(2) SRA to grant a perpetual Fortuna injunction to restrain the defendant

from presenting a winding up petition against the plaintiff. This decision is based on the following reasons: A

(a) as decided in *Likas Bay Precinct*, by reason of the AD (which is not challenged by the plaintiff), the defendant is a 'creditor' of the plaintiff within the meaning of s 464(1)(b) of the CA and is thereby entitled to present a winding up petition against the plaintiff under s 465(1)(e) of the CA; and B

(b) the defendant's exercise of its statutory rights under ss 464(1)(b) and 465(1)(e) of the CA cannot amount to an abuse of court process. Accordingly, there is no basis for this court to issue a perpetual Fortuna injunction in the plaintiff's favour. C

THE COURT'S DECISION

[26] A summary of this decision is as follows: D

(a) this OS is not defective for lumping together the stay application and Fortuna injunction application;

(b) based on the AD (which is not challenged by the plaintiff), the defendant is a 'creditor' of the plaintiff within the meaning of s 464(1)(b) of the CA and is therefore entitled to present a winding up petition against the plaintiff under s 465(1)(e) of the CA; E

(c) the stay application is dismissed because:

(i) the adjudicator has not made any clear error in making the AD; and F

(ii) it is in the interest of justice that the AD is not stayed pending the disposal of the arbitration; and

(d) notwithstanding the dismissal of the stay application, this court has a discretionary power to grant a perpetual Fortuna injunction under ss 50 and 51(2) SRA. However, the court decides not to issue a Fortuna injunction in this case because: G

(i) the defendant can rely on the AD to present a winding up petition against the plaintiff pursuant to ss 464(1)(b) and 465(1)(e) CA; and H

(ii) the exercise of the defendant's statutory rights under ss 464(1)(b) and 465(1)(e) CA cannot constitute an abuse of court process by the defendant. I

[27] Premised on the above reasons, this OS is dismissed with costs.

Originating summons dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali